Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-570 OF 1993
ANUAR CJ (MALAYA), MOHD AZMI AND ZAKARIA YATIM FCJJ
17 FEBRUARY 1997

Succession *— Probate — Validity of will — Probate granted — Application for order to declare the will a forgery — Whether will was one executed by deceased — Whether grant of probate should be revoked*

Evidence *— Witness — Evidence of witness not tested by cross-examination — Witness absconding before cross-examination could be completed — Whether evidence admissible — What weight should be put on the evidence*

Evidence *— Expert evidence — Handwriting — Whether evidence of expert witness on authenticity of signature in will must be corroborated — How the evidence of an expert witness on authenticity of signature should be treated*

On 29 August 1982, one Nadarajah ('the deceased') died intestate, his mother being the sole beneficiary of his estate pursuant to the Distribution Act 1958. Subsequently, the deceased's mother died testate naming her grandson, the plaintiff (the nephew of the defendant and the deceased), as the sole beneficiary and executor of her will. Acting on the will of his grandmother, the plaintiff through his attorney, applied to the High Court and obtained a grant for letters of administration for the estate of the deceased ('the first action'). The defendant then presented a petition ('the second action') in the High Court for the administration of the deceased's estate on the basis that the deceased died intestate. However, the defendant did not proceed with this petition. Subsequently a will, alleged to be that of the deceased, surfaced. In this alleged will, the defendant was named as the executor and the beneficiaries named therein were the defendant, the plaintiff and two sisters of the deceased. Acting on the alleged will, the defendant petitioned the High Court ('the third action') for probate and obtained the grant thereof. The plaintiff lodged a caveat in the third action and commenced proceedings in the High Court for the revocation of the order for grant of probate ('the fourth action'). He obtained an interim injunction restraining the defendant from acting on the grant of probate that was issued in the third action. Notwithstanding the order, the defendant continued to act as executor of the deceased's estate. This prompted the plaintiff to commence yet another action against the defendant ('the fifth action'). Despite the pending actions, the defendant did not take any steps to propound the alleged will. The plaintiff therefore filed another action ('the sixth action') and sought an order to declare the alleged will a forgery and to revoke the grant of probate granted in favour of the defendant. The learned judge in the sixth action issued various directions including an order for a stay of all actions except the injunction granted in the fourth action. The court also made an order

for an early trial of the sixth action. At the conclusion of the trial of the sixth action which took several years, the learned judge held that the will was genuine and dismissed the plaintiffs probate suit with costs. The present appeal was against that decision. At the trial, the learned judge had relied on evidence of three of the defendant's witnesses, DW1, DW2 and DW3 while the evidence of PW1, a handwriting expert, was excluded. The cross-examination of DW1 was not completed because DW1 went missing. The judge resolved the sole issue before the court solely on the evidence of DW1, DW2 and DW3 and disregarded the evidence of PW1, PW3 and PW8. The sole issue in this appeal was whether the alleged will of the deceased was genuine or a forgery.

Held, allowing the appeal:

(1) Having regard to the fact that the trial judge had overlooked or failed to take into account or give proper weight to, or draw proper inference from the relevant matters, which otherwise might have caused him to come to a different conclusion, the judge therefore had not taken proper advantage of his having seen and heard the witnesses. The present appeal therefore came within the range of cases where the appellate court was at liberty to act upon its own view of the conflicting evidence (see p 82F–G); *Muniandy & Ors v PP* [1966] 1 MLJ 257 and *Yusoff bin Kassim v PP* [1992] 2 MLJ 183 followed.

(2) The opportunity to cross-examine must be a real opportunity. The right to cross-examination was not enough; there must be opportunity to exercise the right. The evidence of a witness which could not be tested by cross-examination was admissible but the weight to be attached to such evidence should depend on the circumstances of each case. The court should look at the evidence carefully to see whether there were indications that a completed cross-examination was likely to seriously shake the testimony. Based on the record of the case, the cross-examination of DW1, the solicitor who had allegedly prepared the will of the deceased, was far from over when he went missing as several areas of the plaintiff's case and many inconsistencies in the evidence of DW1 were not even put to him (see pp 78B–I and 79A); *Maharaja of Kolhapur v S Sundaram Ayyar & Ors* AIR 1925 Mad 497, *Mt Horil Kuer & Anor v Rajab Ali & Ors* AIR 1936 Pat 34 and *Diwan Singh v Emperor* AIR 1933 Lah 561 followed.

(3) On the facts of this case, if the cross-examination of DW1 had been completed, the indications were that his credibility would have been shaken. This was in view of the contemporaneous evidence and the fact that the exchange of letters between DW1's firm and the solicitors for the defendant took place in suspicious circumstances. The learned judge had taken a very charitable view of DW1 and his affairs without really testing his evidence against the totality of evidence or the probabilities of the case.

Very little weight therefore should have been attached to DW1's evidence (see p 79B–H).

(4) The learned judge had accepted the evidence of DW1 and DW2, the despatch clerk in the office of DWI, and DW3 in toto without proper scrutiny. He had failed to address his mind to the totality of their evidence (see p 80B–C).

(5) At the close of the defendant's case there were numerous circumstances that clearly excited the suspicion of the court and these were still present and were not removed. The learned judge failed to consider any one of them and to ascertain if the burden under the law which required the defendant to prove his case had been discharged. Suspicious circumstances surrounding the emergence of the will were numerous. The circumstances were highly suspicious, abnormal and not normally expected in any ordinary situation or from a normal person. None of these suspicious circumstances was explained. The suspicions were not removed at all either after the witnesses gave their evidence or for that matter even after the close of the defendant's case (see p 81C–E).

(7) The opinion of expert witnesses was admissible in evidence and there was no requirement in law that such evidence be corroborated. The learned trial judge should have accepted the expert evidence of PW1 that the signature in the will was not the signature of the deceased. The learned judge ought to have so concluded having regard to the evidence in its totality, including the very unlikelihood of an extremely careful and cautious non-practising lawyer like the deceased to have simply walked into a law firm to have his last will drawn up by a solicitor with whom he had no previous dealing, and yet leaving the will at the solicitor's office without making any payment or even collecting it or leaving any instructions to the solicitor. These suspicious circumstances in which the will had suddenly appeared together with the evidence of the expert, PW1, proved beyond reasonable doubt that the will was a forgery (see pp 84C and 89E–G); *Murarilal v State of MP* AIR 1980 SC 531 and *Dato' Mokhtar bin Hashim v PP* [1983] 2 MLJ 232 followed.

Obiter:

After the caveat was lodged and the citation was served, the defendant ought to have taken immediate steps to propound the will so that the sole issue could have been resolved without delay. Failure to do so has resulted in a number of suits being filed between the same parties. Solicitors, being officers of the court, should assist the courts in controlling and preventing multiplicity of proceedings of this nature, especially when there were clear rules available for the prosecution of civil proceedings of this nature where the sole issue was crystal clear (see p 70H–I).

[Bahasa Malaysia summary

Pada 29 Ogos 1982, seorang bernama Nadarajah ('si mati') telah meninggal dunia tanpa wasiat, dan ibunya adalah benefisiari tunggal estetnya menurut Akta Pembahagian 1958. Kemudiannya, ibu si mati telah meninggal dunia dengan meninggalkan wasiat dan menamakan cucu lelakinya, iaitu plaintif (anak saudara defendan dan si mati), sebagai benefisiari tunggal wasinya. Bertindak atas wasiat neneknya, plaintif melalui peguamnya memohon kepada Mahkamah Tinggi dan memperolehi pemberian surat kuasa mentadbir untuk harta pusaka si mati ('tindakan pertama'). Defendan kemudiannya mengemukakan suatu petisyen ('tindakan kedua') di Mahkamah Tinggi untuk pentadbiran harta pusaka si mati atas dasar bahawa si mati telah meninggal dunia tanpa wasiat. Namun demikian, defendan tidak meneruskan petisyen ini. Kemudiannya satu wasiat, yang dikatakan adalah milik si mati, telah timbul. Dalam wasiat yang dikatakan ini, defendan dinamakan sebagai wasi dan benefisiari yang dinamakan dalamnya adalah defendan, plaintif dan dua adik perempuan si mati. Bertindak atas wasiat yang dikatakan, defendan mempetisyen Mahkamah Tinggi ('tindakan ketiga') untuk probet dan memperolehi pemberiannya. Plaintif mengemukakan satu kaveat dalam tindakan ketiga dan memulakan prosiding di Mahkamah Tinggi untuk pembatalan perintah pemberian probet ('tindakan keempat'). Dia memperolehi satu injunksi interim yang menahan defendan daripada berindak atas pemberian probet yang dikeluarkan dalam tindakan ketiga. Tanpa mengendahkan perintah itu, defendan terus bertindak sebagai wasi harta pusaka si mati. Ini menyebabkan plaintif memulakan satu lagi tindakan terhadap defendan ('tindakan kelima'). Meskipun terdapat tindakan yang menunggu penyelesaian, defendan tidak mengambil sebarang langkah untuk mengemukakan wasiat yang dikatakan. Oleh itu, plaintif memfailkan satu lagi tindakan lain ('tindakan keenam') dan meminta satu perintah supaya wasiat yang dikatakan diisytiharkan sebagai satu pemalsuan dan untuk membatalkan pemberian probet yang diberikan memihak kepada defendan. Hakim yang arif dalam tindakan keenam mengeluarkan pelbagai arahan termasuk satu perintah untuk penggantungan semua tindakan kecuali injunksi yang diberikan dalam tindakan keempat. Mahkamah juga membuat satu perintah untuk perbicaraan awal tindakan keenam. Di penamatan perbicaraan tindakan keenam yang mengambil masa beberapa tahun, hakim yang arif memutuskan bahawa wasiat adalah tulen dan menolak guaman probet plaintif dengan kos. Rayuan sekarang adalah terhadap keputusan tersebut. Di perbicaraan, hakim yang arif telah bergantung kepada keterangan tiga daripada saksi defendan, DW1, DW2 and DW3 manakala keterangan PW1, seorang pakar tulisan, dikecualikan. Pemeriksaan balas DW1 tidak lengkap kerana DW1 menghilangkan diri. Hakim menyelesaikan isu tunggal di hadapan mahkamah semata-matanya atas keterangan DW1, DW2 dan DW3 dan mengabaikan keterangan PW1, PW3 dan PW8. Satu-satunya isu dalam rayuan ini adalah sama ada wasiat si mati yang dikatakan adalah tulen atau satu pemalsuan.

Diputuskan, membenarkan rayuan:

(1) Memandangkan fakta bahawa hakim perbicaraan telah tidak mengendahkan atau gagal mengambil kira atau memberi pertimbangan yang wajar kepada, atau membuat inferens wajar daripada perkara-perkara relevan, yang mungkin sebaliknya menyebabkannya membuat kesimpulan yang berbeza, dengan itu hakim tidak menggunakan manfaat daripada melihat dan mendengar saksi-saksi. Dengan itu rayuan sekarang adalah dalam lingkungan kes di mana mahkamah rayuan adalah bebas bertindak atas hemat sendiri tentang keterangan yang bercanggah (lihat ms 82F–G); *Muniandy & Ors v PP* [1966] 1 MLJ 257 dan *Yusoff bin Kassim v PP* [1992] 2 MLJ 183 diikut.

(2) Peluang untuk memeriksa balas mestilah merupakan satu peluang tulen. Hak untuk pemeriksaan balas tidak mencukupi; mesti adanya peluang untuk melaksanakan hak itu. Keterangan seorang saksi yang tidak boleh diuji oleh pemeriksaan balas boleh diterima tetapi pertimbangan yang patut diberikan kepada keterangan demikian harus bergantung kepada keadaan setiap kes. Mahkamah haruslah betul-betul meneliti keterangan bagi menentukan sama ada terdapat tanda-tanda bahawa satu pemeriksaan balas yang lengkap mungkin akan mengganggu testimoni secara serius. Berdasarkan rekod kes, pemeriksaan balas DW1, peguamcara yang dikatakan telah menyediakan wasiat si mati, jauh daripada selesai apabila beliau menghilangkan diri kerana beberapa bahagian kes plaintif dan banyak ketidaktekalan dalam keterangan DW1 tidak dikemukakan kepadanya (lihat ms 78B–I dan 79A); *Maharaja of Kolhapur v S Sundaram Ayyar & Ors* AIR 1925 Mad 497, *Mt Horil Kuer & Anor v Rajab Ali & Ors* AIR 1936 Pat 34 dan *Diwan Singh v Emperor* AIR 1933 Lah 561 diikut.

(3) Atas fakta-fakta kes ini, jika pemeriksaan balas DW1 telah selesai, tanda-tanda menunjukkan bahawa kebolehpercayaannya akan terancam. Ini adalah memandangkan keterangan semasa dan fakta bahawa penukaran surat antara firma DW1 dan peguamcara defendan berlaku dalam keadaan yang syak. Hakim yang arif telah mengambil pandangan yang bertimbang rasa terhadap DW1 dan urusannya tanpa menguji keterangannya terhadap keseluruhan keterangan atau kebarangkalian kes. Oleh itu, pertimbangan yang sangat sedikit sepatutnya diberikan kepada keterangan DW1 (lihat ms 79B–H).

(4) Hakim yang arif telah menerima keterangan DW1 dan DW2, kerani penghantar di pejabat DWI, dan DW3 secara in toto tanpa penelitian wajar. Beliau telah gagal mempertimbangkan keseluruhan keterangan mereka (lihat ms 80B–C).

(5) Di penutup kes defendan terdapat pelbagai keadaan yang jelas menimbulkan kecurigaan mahkamah dan ini masih didapati dan tidak dipadamkan. Hakim yang arif gagal mempertimbangkan mana-mana satu daripadanya dan untuk menentukan jika beban di bawah undang-undang yang menghendaki defendan

membuktikan kesnya telah dilepaskan. Keadaan syak di sekitar kemunculan wasiat adalah terlalu banyak. Keadaan adalah amat sangsi, luar biasa dan tidak lazimnya dijangka dalam apa-apa keadaan biasa atau daripada seorang biasa. Tidak satu pun daripada keadaan syak ini dijelaskan. Perasaan syak tidak padam sama sekali sama ada selepas saksi-saksi memberi keterangan mereka atau pun begitu juga selepas penutup kes defendan (lihat ms 81C–E).

(7) Pendapat saksi pakar boleh diterima dalam keterangan dan tiada keperluan dalam undang-undang bahawa keterangan demikian disokong. Hakim perbicaraan yang arif sepatutnya menerima keterangan pakar PW1 bahawa tandatangan dalam wasiat bukanlah tandatangan si mati. Hakim yang arif sepatutnya telah menyimpul begitu memandangkan keseluruhan keterangan, termasuk ketidakmungkinan seorang peguam yang tidak mengamalkan bidangnya yang sungguh berhati-hati dan waspada seperti si mati untuk semata-mata pergi berjumpa dengan sebuah firma undang-undang bagi membolehkan wasiatnya yang terakhir dibuat oleh seorang peguamcara yang tidak pernah berurus dengannya, dan namun begitu meninggalkan wasiat di pejabat peguamcara tanpa membuat sebarang bayaran atau pun mengutipnya atau meninggalkan apa-apa arahan kepada peguamcara. Keadaan-keadaan syak ini dalam mana wasiat muncul dengan tiba-tiba bersama dengan keterangan pakar, PW1 membuktikan melampaui keraguan munasabah bahawa wasiat merupakan satu pemalsuan (lihat ms 84C dan 89E–G); *Murarilal v State of MP* AIR 1980 SC 531 dan *Dato' Mokhtar bin Hashim v PP* [1983] 2 MLJ 232 diikut.

Obiter:

Selepas kaveat dikemukakan dan saman disampaikan, defendan sepatutnya telah mengambil langkah segera untuk mengemukakan wasiat supaya satu-satunya isu boleh diselesaikan tanpa kelewatan. Kegagalan untuk berbuat demikian telah mengakibatkan beberapa guaman difailkan antara pihak-pihak yang sama. Peguamcara yang merupakan pegawai mahkamah harus membantu mahkamah dalam mengawal dan mencegah kepelbagaian prosiding jenis ini, terutamanya apabila terdapat rukun jelas yang boleh digunakan dalam pendakwaan prosiding sivil jenis ini di mana satu-satunya isu adalah begitu nyata (lihat ms 70H–I).]

Notes

For cases on probate, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1971–2022.

For cases on witness, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1635–1737.

For cases on expert evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 896–961.

Cases referred to

Barry v Butlin 2 Moo PC 480 (refd)
Browne v Dunn (1893) 6 R 67 (refd)
Dalip Kaur v Pegawai Polis Daerah [1992] 1 MLJ 1 (refd)
Dato' Mokhtar bin Hashim v PP [1983] 2 MLJ 232 (folld)
Diwan Singh v Emperor AIR 1933 Lah 561 (folld)
Indu Bala v Maindra Chandra Bose AIR 1982 SC 133 (refd)
Karthiyayani v Lee Liong Sin [1975] 1 MLJ 119 (refd)
Khoo Cheng Huat v PP [1991] 1 MLJ 42 (refd)
Lai Yong Koon v PP [1962] MLJ 327 (refd)
Maharaja of Kolhapur v S Sundaram Ayyar & Ors AIR 1925 Mad 497 (folld)
Mt Horil Kuer & Anor v Rajab Ali & Ors AIR 1936 Pat 34 (folld)
Muniandy & Ors v PP [1966] 1 MLJ 257 (folld)
Murarilal v State of MP AIR 1980 SC 531 (folld)
Sim Ah Oh v PP [1962] MLJ 42 (refd)
Tan Hun Wah v PP [1994] 1 MLJ 382 (refd)
TN Nathan v PP [1978] 1 MLJ 134 (refd)
Tyrrell v Painton & Anor [1894] P 151 (refd)
Yuill v Yuill [1945] P 15 (refd)
Yusoff bin Kassim v PP [1992] 2 MLJ 183 (folld)

Legislation referred to

Distribution Act 1958 s 6(1)(iv)
Evidence Act 1950 ss 45, 47, 51, 67, 68, 73, 101, 102, 103, 106
Probate and Administration Act 1959 s 5
Rules of the High Court 1980 O 71, O 72

Appeal from: Suit No 2105 of 1985 (High Court, Ipoh)

CV Das (*Shahul Hameed Amiruddin* and *Nantha Balan* with him) (*Shook Lin & Bok*) for the appellant.

Vijaya Segaran (*Paul Subramaniam* and *G Balasundram* with him) (*Maxwell Kenion Cowdy & Jones*) for the respondent.

Anuar CJ (Malaya) (delivering the judgment of the court): The brief facts are that on 29 August 1982, one Nadarajah ('the deceased'), a wealthy bachelor and a non-practising lawyer, died unexpectedly. The deceased was survived by his natural and lawful mother, brother ('the defendant') and two sisters. As no will was found, it was believed by all concerned that the deceased died intestate. If this was so, then pursuant to s 6(1)(iv) of the Distribution Act 1958, the deceased's mother, Datin Sellayee Ammal w/o Dato' Sithambaram Pillai ('the mother') would be the sole beneficiary to the estate of the deceased. However, shortly after, ie on 1 October 1982, the mother too died in India. But the mother died testate naming her grandson, the plaintiff (who is the nephew of the deceased and the defendant) as the sole beneficiary and executor of her will.

Acting on the will of the mother, the plaintiff — through his attorney — applied to the High Court at Kuala Lumpur and obtained a grant of letters of administration for the estate of the deceased. A will alleged to be that of the deceased surfaced in suspicious circumstances, of which more will be said later. In this alleged will, the defendant was named as the executor and the beneficiaries named therein were the defendant, the plaintiff and the two sisters of the deceased. Acting on this alleged will, the defendant petitioned the High Court at Ipoh for probate and obtained the grant thereof. Upon being informed of the grant of probate and of the will, the plaintiff took steps to set aside the grant, inter alia, on the ground of forgery.

Hence the sole issue before the court was whether the alleged will of the deceased was genuine or a forgery.

In view of two observations to be made shortly on multiplicity of proceedings and the delay in concluding the trial, it becomes necessary in narrating these facts to state somewhat in detail the various actions instituted by the plaintiff and the defendant and the manner in which the trial was conducted in instalments over a period of seven years.

As stated earlier, the plaintiff through his attorney, acting on the will of the mother, petitioned the High Court at Kuala Lumpur for grant of letters of administration with the mother's will annexed for administration of the mother's estate in Malaysia which, by reason of the earlier said provision of the Distribution Act 1958, included the properties of the deceased ('the first action'). On 16 August 1983, an order was made for grant of administration. On 4 October 1983, a copy of this order was served on the solicitors for the defendant. In response, on 31 October 1983, the defendant lodged a caveat on the sealing of the grant in favour of the plaintiff.

Sometime in 1983, the defendant presented a petition in the High Court at Ipoh for administration of the deceased's estate ('the second action'). The basis for his petition was that the deceased had died intestate. The mother had died. This petition was presented without notice to the plaintiff. For reasons that subsequently transpired, ie the surfacing of the will, the defendant did not proceed with this petition.

On 12 March 1984, the defendant presented a fresh petition in the same High Court, but this time for grant of probate in his favour as executor and a beneficiary of the deceased's estate ('the third action'). This petition was grounded on the alleged will of the deceased dated 7 April 1982. This too was without any notice to the plaintiff, albeit the plaintiff was named as one of the beneficiaries to the deceased's estate in the alleged will. On 21 August 1984, the High Court at Ipoh ordered the grant of probate. By a letter dated 25 August 1984, the solicitors for the defendant informed the solicitors for the plaintiff of the order and of the existence of the alleged will. The defendant's solicitors suggested that in the light of the existence of the will, the plaintiff should withdraw his petition.

It was not disputed that the said letter dated 25 August 1984 was the first time the defendant informed the plaintiff of the existence of the alleged will or for that matter, the fact that he had also presented a petition

A for grant of probate and that an order had been obtained. It is to be noted that the defendant was fully aware, since August 1983, that the plaintiff had obtained an order in the first action in respect of the same estate. Hence two orders for grant were made in respect of the same estate.

The only reason offered by the solicitors for the defendant for not B informing the plaintiff earlier is contained in their letters to the solicitors for the plaintiff. They blamed this on the omission on the part of the defendant's solicitor's probate clerk. Neither evidence was adduced nor any other explanation was offered at the trial to explain this.

In the event, the plaintiff instructed his solicitors to write to the C solicitors for the defendant to say that the defendant had 'fraudulently misrepresented to the High Court at Ipoh that Nadarajah s/o Sithamparam died leaving his will'. On 10 April 1984, the plaintiff lodged a caveat in the High Court at Ipoh in the third action. On 15 October 1984, the plaintiff commenced proceedings in the High Court at Kuala Lumpur vide Originating Motion No F–54–1984 ('the fourth action') for the revocation D of the order for grant of probate made in the High Court at Ipoh. There were two grounds for the motion. One under s 5 of the Probate and Administration Act 1959 (ie two grants being given simultaneously in respect of the same estate) and the other on the ground that the alleged will was a forgery. On 24 October 1984, the plaintiff obtained an interim injunction restraining the defendant from acting on the grant of probate E that was issued by the High Court at Ipoh in the third action. Thereafter, the plaintiff served a citation on the defendant to bring in and deposit the alleged will in the High Court at Kuala Lumpur together with a copy of the probate. On 1 April 1985, the High Court at Kuala Lumpur further ordered, inter alia, the proceedings in the fourth action to be transferred to F the High Court at Ipoh and the defendant to hand over the administration of the estate of the deceased to the Official Administrator.

Notwithstanding the above order made in the fourth action, the defendant appeared to have continued to act as the executor of the deceased's estate and on 31 October 1984, purported to consent to an G order being made in a civil action brought by some third parties ('the third party action'), for the sale of certain lands belonging to the estate of the deceased. This prompted the plaintiff to commence yet another action by way of writ. On 21 November 1985, the plaintiff commenced the writ action against the defendant vide Civil Action No 2087 of 1985 and filed it in the High Court at Ipoh ('the fifth action'). In this suit, the plaintiff H sought to have the consent order entered by the defendant in the third party action declared a nullity. On 10 December 1985, the plaintiff also obtained an interim injunction to restrain the third parties from acting on the terms of the consent order.

Despite these pending actions, the defendant did not take any steps I to propound the alleged will. This failure on the part of the defendant prompted the plaintiff to file yet another action on 26 January 1985 vide Probate Civil Suit No 2105 of 1985 in the High Court at Kuala Lumpur ('the sixth action') and sought to declare the alleged will a forgery and for an order to revoke the grant of probate granted in favour of the defendant.

On 28 April 1986, the learned judge in the sixth action issued various directions including an order for a stay of all actions except the injunction granted in the fourth action. The court also made an order for an early trial of the sixth action. Further the court made consequential orders allowing the plaintiff to inspect, through his expert, the alleged will.

Now the chronology of the trial.

The plaintiff adduced evidence through 11 witnesses and the defendant through six witnesses. The trial commenced on 18 September 1986. On 18 September 1986 and 19 September 1986 PW1 testified. Thereafter, on 30 March 1987, DW1 testified. Then, the case was adjourned to 1 November 1988. DW 3 testified on 12 December 1988. On this date, PW2 also testified. Thereafter on 13 December 1988, PW3, PW4 and PW5 testified. The next date of hearing was on 29 November 1989 on which date PW3 was recalled and PW6 commenced his evidence. On 24 October 1990, PW7 testified and on 25 October 1990, PW6 continued his evidence. On 9 January 1991, PW8 gave his evidence. On 23 July 1991, DW4 continued his evidence and thereafter DW5 gave his evidence. On the following day, 24 July 1991, DW6 gave his evidence.

As can be seen the trial which commenced on 18 September 1986 was heard by way of instalments over a period of five years. Written submissions were filed by the defendant on 11 September 1991 and by the plaintiff on 11 November 1991. The defendant's reply to the plaintiff's submission was filed on 15 July 1993 some 20 months later. With leave of the court, the plaintiff filed his closing written submission on 3 September 1993. The learned judge delivered his judgment on 11 September 1993 and his grounds on 6 November 1993.

Even thought there was no delay as such in delivering the grounds of judgment, it was delivered within 1½ months from the closing of submission, it is to be noted that the judgment was delivered about seven years after the trial had commenced and two years after the last witness was heard.

The learned judge held that the will was genuine and dismissed the plaintiff's probate suit with costs. The present appeal is against that decision. Before dealing with the merits of this appeal, we are constrained to comment on the two observations made earlier, namely, multiplicity of proceedings and the inordinate delay in concluding the trial.

Orders 71 and 72 of the Rules of the High Court 1980 ('the RHC') provide for the conduct respectively of both non-contentious and contentious probate proceedings.

After the caveat was lodged and the citation was served, the defendant ought to have taken immediate steps to propound the will so that the sole issue could have been resolved without delay. Failure to do so and his other acts necessitated the number of suits being filed between the same parties. In these circumstances, it is strange that the RHC were not strictly adhered to. But what is seen here is an intolerable and unhealthy situation. Solicitors, being officers of the court, should assist the courts in controlling and preventing multiplicity of proceedings of this nature, especially when there are clear rules available for the prosecution of civil proceedings of this nature where the sole issue was crystal clear.

A The other disturbing feature is the inordinate delay. As seen earlier, the trial court heard evidence in instalments over a period of five years and did not deliver judgment for the next two years. We respectfully adopt Mohd Azmi SCJ's definition of delay in *Tan Hun Wah v PP* [1994] 1 MLJ 382 at p 388 wherein he held that:

B > Delay in court proceedings means that there is an excessive interval between the point when a case is commenced and when it can be adjudicated.

In the course of this judgment several decisions made in criminal jurisdiction will be cited. They are relevant as the principle enunciated in those cases apply with equal force to civil cases.

C In the present case, the learned judge in his judgment had commented on the demeanour of certain witnesses. The fact that the evidence was recorded over a period of five years and the last witness's evidence was recorded two years prior to the judgment leaves a lingering doubt in our mind, not only as to what or how much of the evidence would be retained D in the mind but also as to the fairness and likely prejudice therefrom, especially in the judge omitting or not considering all the relevant aspects of the evidence that was adduced.

In particular, the learned judge had substantially relied on the evidence of DW1, DW2 and DW3 to arrive at his decision. PW1's evidence, of which more will be said later, was excluded in toto or not sufficiently E considered.

The evidence of PW1 was recorded on 18 September 1986 and 19 September 1986, seven years prior to the date of judgment. DW1's evidence was recorded on 30 March 1987, some six years prior to the date of judgment. DW2's and DW3's evidence were recorded on 1 November F 1988, 2 November 1988, 9 November 1988 and on 12 December 1988 respectively some five years prior to the date of judgment. In this context, with respect, we agree with Mohd Azmi SCJ's observation in *Tan Hun Wah v PP* [1994] 1 MLJ 382 at p 391 which we reproduce below:

> Where prejudice or unfairness had been sufficiently established, we agreed G with and adopted the principle enunciated in the authorities cited before us on the effect of excessive delay not only in the supply of grounds of judgment but also delay in the trial itself. If the facts of the case so warrant, where there is a long delay in the supply of the grounds of judgment, an appellate court would readily accept the allegation of prejudice on the basis that there is every likelihood not only that the trial judge's impression on all H demeanour of witnesses would be blurred, but also the delay would increase the chances of omission on the part of the trial judge to deal with material facts and issues in the grounds of judgment which ought to have been favourable to the appellants. Such danger would of course be increased by manifold, when, as in the present case, the trial was conducted by instalments over a long period.

I A similar observation was made by Gunn Chit Tuan J (as he then was) in *TN Nathan v PP* [1978] 1 MLJ 134 at p 135F–G:

> But after a period of 11 months from the date of conclusion of the trial, it was doubtful if the learned President could have remembered the impression which witnesses made upon him.

The learned judge resolved the sole issue before the court, ie whether the alleged will was that of the deceased, in the affirmative, solely on the evidence of DW1, DW2 and DW3 and in total disregard of PW1's, PW3's and PW8's evidence. Even though he accepted the evidence of PW6, it would appear that he did not consider that evidence or give any weight to it.

Before adverting to the learned judge's comments on the evidence that was before him, it would be useful to state briefly the law applicable when a will is challenged.

The relevant sections in our Evidence Act 1950 are ss 67, 68 and 73 which are reproduced below:

> 67 Proof of signature and handwriting of person alleged to have signed or written document produced
>
> If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting shall be proved to be in his handwriting.
>
> 68 Proof of execution of document required by law to be attested
>
> If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the Court and capable of giving evidence.
>
> ...
>
> 73 Comparison of signature, writing or seal with others admitted or proved
>
> (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by *a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.*
>
> (2) ...
>
> (3) ...

Sections 101, 102, 103 and 106 of the Evidence Act 1950 deal with the burden of proof. Under s 101, it is provided that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. Under s 102 the burden of proof lies on that person who would fail if no evidence at all were given on either side. Under s 103, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Under s 106, when any fact is especially within the knowledge of any person the burden of proving that fact is upon him.

Although a number of cases were cited, two cases relied on by the learned judge and referred to in his judgment, would be sufficient to illustrate the law. In the case of *Tyrrell v Painton & Anor* [1894] P 151 Lindley LJ referred to the Privy Council case of *Barry v Butlin* 2 Moo PC 480 where it was held:

> The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The first, that the onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

The Supreme Court of India in *Indu Bala v Maindra Chandra Bose* AIR 1982 SC 133 described the nature of circumstance that would excite the court's suspicion as:

> A circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.

At the commencement of the trial, after hearing submissions, the learned judge ordered the defendant to begin his case first, ie to prove the will. This, in our view, was the correct procedure as the defendant, who was relying on the will, had to prove the will.

As a close scrutiny of the evidence is called for, it becomes imperative to summarize the evidence that was before the learned judge. A narrative of the evidence adduced by the defendant, adopting a chronological order of events, would be as follows.

On 6 April 1982, one day prior to the execution of the will in Jalan Masjid India in Kuala Lumpur, DW3, a casual acquaintance of the deceased, met the deceased by chance. In a casual conversation, the deceased allegedly requested DW3 to recommend him a lawyer so that the deceased could prepare his will. On the same evening, DW3 rang up DW1, an advocate and solicitor, for an appointment.

On 7 April 1982, at about 10am DW3 accompanied the deceased and one other Indian named Kalyanasundaram, a clerk of DW3 to visit the office of DW1.

The deceased allegedly instructed DW1 to prepare a will and furnished the requisite particulars. The instructions were fairly simple and straightforward. The deceased wished to appoint his brother, the defendant, as the sole executor and devised all his property in equal shares amongst the defendant, the plaintiff and the deceased's two sisters. DW1 then called his clerk and instructed him to prepare the will.

They waited at DW1's office for about an hour for the will to be prepared. The deceased executed the will attested by DW1 and DW2, a despatch clerk in DW1's office. It is significant to note that this was the only occasion DW2 had ever been asked to attest a will.

The fee charged by DW1 was RM300. However, the deceased did not have any money with him and said that he would pay and collect the

will later. Nothing was heard after that although the deceased continued to stay in Kuala Lumpur for the next two weeks. DW1 did not do anything about the will or collect the money from the deceased.

The deceased died on 29 August 1982. No will was found. No one informed the defendant or plaintiff or the other beneficiaries in the will.

In 1983, both the plaintiff and the defendant filed the first and second actions respectively in the High Court at Kuala Lumpur and at Ipoh. The only, but very material, difference between the two actions was that the plaintiff's petition was based on the mother's will, whereas the defendant's action was for letters of administration. The defendant, however, did not take any further proceedings with his second action.

In the meantime, DW1 was changing office. While going through his files to select those which could be stored away, he came across the will of the deceased. So by a letter dated 26 September 1983, he wrote to the deceased asking him to collect the will and to pay the RM300 which was still due. That letter was allegedly returned undelivered with the remark that the 'Addressee was dead'.

DW1 in his evidence has categorically stated and maintained that he knew of the deceased's demise only from the letter which was returned undelivered. But he was unable to produce this letter or for that matter, remember whether he had seen it personally or if he was informed, and if so, who informed him or the language in which that annotation appeared. Nonetheless he maintained that the undelivered letter was the sole source of his knowledge regarding the death of the deceased. In the event DW1 was prompted to write, by a letter dated 2 November 1983 to the defendant, the executor named in the alleged will, informing the defendant of the undelivered letter and the existence of the will. He further asked the defendant to collect the will after paying the RM300 (exh P16).

By a letter dated 16 November 1983, the defendant's solicitors in response to P16 and enclosing a cheque for RM300 requested for a copy of the will (exh P14E). There was no response from DW1's firm. By a letter dated 8 December 1983 (presumably after a telephone conversation), the defendant's solicitors informed DW1's firm that the defendant did not collect the will and that the defendant had gone earlier to DW1's firm and was advised by DW1's firm to bring another beneficiary. The letter went on to say that when the defendant brought in a beneficiary, DW1's firm informed the defendant that the Bar Council had advised DW1's firm not to part with the will. The defendant's solicitors, by the same letter, sought clarification on these facts (exh P141).

By a letter dated 9 December 1983, DW1's firm informed the defendant's solicitors (presumably P141 was on its way and and had not reached PW1's firm) that only two copies of the will were made and that both were collected by the defendant.

The last letter in that series of correspondence is dated 28 December 1983 from the defendant's solicitors to DW1's firm. It was a letter alleging that both copies of the will were collected by some impersonator and not the defendant and requested that the instruction to prepare the will be

A preserved so that the will can be reconstructed. Further it confirmed DW1's request that no police report would be lodged (exh P14C) regarding the collection of the will by an impersonator.

Perhaps it is not out of context here to refer to exh P17. It is a letter from the defendant's solicitors dated 10 September 1984 addressed to the B plaintiff's solicitors explaining the sudden emergence of the will. The letter stated that 'we thereafter contacted Messrs Wong & Liew and obtained possession of the original will'. So the defendant claimed that the will was obtained from DW1's firm. DW1 however denied this.

It must be observed that no evidence was adduced on the sudden disappearance and reappearance of the will or on the discrepancy in the C defendant's solicitors' letter. Neither the plaintiff nor the defendant, although present in court, gave evidence. As for DW1, he was missing before the cross-examination was completed.

I shall now refer to the evidence adduced by the plaintiff.

The main witness for the plaintiff is PW1, a document examiner, an D expert in handwriting whose peritus was not challenged. PW1 carried out the examination of the will by comparing the signature under question with 20 signatures of the deceased which were admitted to be genuine. He examined these signatures through a microscope and came to the conclusion that in his opinion the purported will was a forgery. The expert witness E came to the conclusion that the signature in the will was not that of the deceased. In his evidence, PW1 demonstrated, with the aid of blown up photographs, and explained the reasons for arriving at his opinion. Neither his expertise nor the method employed by the witness was questioned or challenged by the defendant.

F The plaintiff called as a witness PW2, an advocate and solicitor, who testified that his principal took over all files and documents of DW1's office, at the behest of the Bar Council, after both DW1 and his partner absconded from the country. PW2 produced in court the files and related registers of DW1's firm. The name of the deceased or the fact of the preparation of the will was not found in those registers.

G The plaintiff also called the chief clerk of DW1 to give evidence. This witness, PW3, denied having prepared the will. His evidence contradicted the evidence of DW3 who stated that DW1 had asked PW3 to prepare the will. In his evidence PW3 said that the normal office procedure was to open a file for each will and to prepare all wills in quadruplicate. According H to him, he had attested a number of wills. The will in this case was an exception in all counts, in that no file was opened or registered or prepared in quadruplicate in accordance with the office procedure. PW3 in his evidence said that he had asked DW1 about the will in the new office but DW1 was 'quite evasive'.

I The next important witness called by the plaintiff is PW6 who is a senior member of the Bar, who had acted as solicitor for the deceased. PW6 told the court of the dispute that existed between the deceased and the defendant, inter alia, on one particular matter relating to the administration of a charitable trust set up by the deceased's father. In that

dispute, the deceased successfully sought the removal of the defendant as the trustee on the ground of misdeeds. PW6 further testified that the deceased was 'extremely careful, extremely cautious' and 'very unlikely for him to walk into a law firm with whom he had no dealings to have a will made and very unlikely for him to have made such a will and left it there without taking it up'. A B

The evidence of PW6 was supported and corroborated by another advocate and solicitor, PW7, who had acted for the deceased in Kuala Lumpur. PW7 testified that the deceased was 'a meticulous person, who would be very careful in choosing solicitors'.

Another important witness for the plaintiff is PW8 who was a clerk to the deceased since 1973. His evidence was that on 7 April 1982, a pay-day, the deceased gave him a cheque to be encashed. At 10.35am, he encashed the cheque and handed over the same to the deceased who apportioned the money to various employees and gave it to him for distribution to the workers. In his evidence, he stated that the deceased left Teluk Intan at about 12.30pm for Kuala Lumpur after he had signed various documents including returns to the Statistics Department. C D

Another witness for the plaintiff is PW9. He is a real estate agent who acted for the deceased, and he confirmed that he met the deceased at 3pm on the day in question. Another witness is PW10, the supervisor of the hotel in Kuala Lumpur in which the deceased normally stayed. He confirmed that on 7 April 1982 the deceased checked into the hotel at 5.30pm and checked out on 21 April 1982. E

The defendant called PW4, a 70-year old part-time clerk employed by the deceased, to give evidence in rebuttal. However, under cross-examination, it was established that this witness only worked for the deceased from March 1982 to May 1982, and he was unable to remember many of the entries in the account book which were referred to him. F

Particular reference must be made to the evidence of DW1. His evidence is very material to prove the genuineness of the will. Unfortunately his evidence was never completed. Whilst DW1 was under cross-examination on the will the hearing was adjourned, and when the case came for continued hearing, DW1 was missing. The learned judge in dealing with this situation allowed that part of the evidence as to show the absence of DW1. The learned judge, however, did not allow the evidence of DW1's character. In his judgment, the learned judge said: G

> The court would also not draw any inference of fact or against the credibility of Mr Wong just solely by virtue of his absence from his office and the newspaper reports about his alleged involvement in a criminal case. H

The learned judge further in his grounds of judgment stated that 'the usual way to injure a witness's credit is while the witness is still in the witness box under cross-examination'. It seems that the learned judge had ignored the fact that DW1 absconded in the course of cross-examination and thereby prevented the plaintiff from either injuring DW1's credit or from putting his case to the witness. The learned judge, however, correctly pointed out that: I

> Under s 155(a) [of the Evidence Act 1950], the credit (credibility) of a witness can be injured by calling any other witness to the box to testify that from his knowledge, the first mentioned witness is unworthy of credit.

Unfortunately, it would appear that the learned judge did not consider the evidence of DW2 and PW3 who testified that DW1, an advocate and solicitor, absconded because of police investigation on some CBT matters. Nor was any consideration given to the unchallenged evidence of PW2 that the Bar Council was compelled to take over DW1's office by reason of DW1 and his partner having absconded. The legal effect on an incomplete cross-examination is a very serious question which the court ought to consider in arriving at any decision.

In his judgment, the learned judge relied on the principles enunciated in *Browne v Dunn* (1893) 6 R 67 (HL). The learned judge cited a passage from the judgment of Lord Halsbury which is reproduced below:

> To my mind nothing would be more absolutely unjust then not to cross-examine witnesses upon evidence which they have given so as to give them notice, and to give them an opportunity of explanation and an opportunity very often to defend their own character.

With respect, the learned judge failed to appreciate that the cross-examination of DW1 was not completed. It must be noted that in the course of cross-examination, DW1 had absconded and therefore the plaintiff was prevented from either putting his case or injuring DW1's credit.

In the course of his judgment the learned judge, when dealing with the evidence of DW1, observed that:

> DW1 did not betray any sign of nervousness; he was quite relaxed and gave evidence matter-of-factly in a manner which any solicitor, having no axe to grind, would have behaved in the box.

This observation, it must be mentioned, was made some seven years after DW1 gave evidence. It is doubtful whether anyone could remember clearly the demeanour of a witness after such a long interval. What is more important is that the observation was made without considering what weight, if any, to be attached to DW1's evidence.

From the record, it is noted that DW1 gave his evidence-in-chief on 30 March 1987. His cross-examination commenced the same afternoon. The hearing was then adjourned to 1 September 1987. However, the case came up for continued hearing only on 1 November 1988. On this date, the court was informed by counsel for the defendant that DW1 could not be found. Counsel told the court that DW1 had left the country. In the event, the cross-examination could not be completed and in fact it was never completed.

It is imperative for the court to consider the legal effect of cross-examination which could not be completed. A passage in 17 *Halsbury's Laws* (4th Ed) para 277 reads:

> Any party is entitled to cross-examine any other party who gives evidence and his witnesses, and no evidence affecting a party is admissible against

that party unless the latter had an opportunity of testing its truthfulness by cross-examination. A

The question which arises here is whether there was an opportunity afforded to the plaintiff to test the truthfulness of the evidence of DW1 by cross-examination. Needless to say such an opportunity must be a real opportunity. The right to cross-examination is not enough; there must be opportunity to exercise the right (opportunity is equivalent to actual cross-examination) — see *Sarkar on Evidence* (14th Ed) at p 1998. At p 1999, Sarkar said: B

> When a witness dies after examination-in-chief and before cross-examination the evidence is admissible, but its probative value may be very small and may even be disregarded. If the examination is substantially complete and the witness is prevented by death, sickness or other causes (mentioned in s 33 [of the Evidence Act 1950]) from finishing his testimony, it ought not to be rejected entirely. But if not so far advanced as to be substantially completed, it must be rejected. C

From the record, it is abundantly clear that the cross-examination was far from over as several areas of the plaintiff's case and most of the matters highlighted here were not even put to the witness. In *Maharaja of Kolhapur v S Sundaram Ayyar & Ors* AIR 1925 Mad 497 at p 537, Kumaraswami Sastri J held: D

> She was ill when she was examined-in-chief and her examination was adjourned after a few sentences in cross-examination were recorded. She died before cross-examination could be resumed. There was considerable argument as to the admissibility of her evidence which it was not possible to test by cross-examination. I do not think that the evidence can be rejected as inadmissible, though it is clear that evidence untested by cross-examination on a question like the present can have little value ... There is nothing in the Evidence Act which renders such evidence inadmissible. In *Rosi v Pillamma* (1910) 20 Madras LJ 400 it was pointed out that evidence was admissible though the learned judges were of opinion that it should be acted upon. I think the correct rule is that the evidence is admissible but that the weight to be attached to such evidence should depend upon the circumstances of each case and that, though in some cases the court may act upon it if there is other evidence on record its probative value may be very small and may even be disregarded. I am not disposed to attach any weight to the evidence of this witness. E F G

In *Mt Horil Kuer & Anor v Rajab Ali & Ors* AIR 1936 Pat 34, it was held that the weight to be attached to the evidence depends on the circumstances and the court should look whether there are indications that by a completed cross-examination, the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached. Rowland J in that case held: H

> This decision which was followed in 1929 Lah 840(7) seems to me, if I may say so with respect, to state the law correctly. I do not understand the observations of the learned judge to mean that there is any hard and fast rule that the probative value of such evidence is small, and in my view, there is no such rule. The weight to be attached to the evidence depends on the circumstances and the court should look at the evidence carefully to see I

> whether there are indications that by a completed cross-examination, the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached.

In the case before us, when we look at the various suspicious circumstances and view them with the contemporaneous evidence, eg exchange of letters between DW1's firm and the solicitors for the defendant and the departure from normal office procedure and exh P15, we cannot but hold that had the cross-examination of DW1 been completed, the indications are that his credibility would have been shaken. In the case of *Diwan Singh v Emperor* AIR 1933 Lah 561 at p 567 Tek Chand J held:

> Nor can Mr Stott's evidence be ruled out as inadmissible simply because his cross-examination was technically incomplete. As stated already, the defence had cross-examined him for nearly two days and he had had to leave Delhi under circumstances over which the Magistrate or the petitioners had no control whatever. Admittedly, his attendance before the conclusion of the enquiry could not be procured without any amount of delay and expense which would be unreasonable. As observed in an American case cited at p 330 of *Sarkar's Law of Evidence* (5th Ed):
>
> > 'No general rule can be laid down in respect of unfinished testimony. If substantially complete and the witness is prevented by sickness or death or other causes (mentioned in s 33 of the Evidence Act) from finishing his testimony whether viva voce or by deposition, it ought not to be rejected entirely, but submitted to the jury with such observations as the particular circumstance may require. But if no so far advanced it to be substantially completed, it must be rejected.'
>
> In my opinion the courts below were right in holding that Mr Stott's evidence was admissible. The value to be attached to it was however a matter primarily for the magistrates.

The principles enunciated in these cases established that the court must consider the weight to be attached to the evidence given by DW1. If the court was of the opinion that the cross-examination was not substantial, then the court need not act upon such evidence. But in the case before us, the learned judge failed to consider this at all. The question as to what the extent the cross-examination had been completed was not considered and determined by the court.

With respect, it would appear that the learned judge took a very charitable view of DW1 and his affairs without really testing his evidence against the totality of evidence or the probabilities of the case or the probative value of weight to be attached. In view of the matters said earlier we are of the opinion that very little weight should be attached to the evidence of DW1.

In his grounds of judgment, the learned judge observed that DW2 was impressive. He observed that:

> His manner of giving evidence and the nature of his evidence all impress me as [that of] a witness of truth. After considering his evidence, and seeing him in the box, the suspicion excited by the rather convenient emergence of the will began to sound very far-fetched ... . Further, I find the evidence of Mr David quite acceptable though he laboured under a not-inconsiderable residue of bitterness against Mr Wong (DW1).

It must be noted that these observations were made some five years after DW2 gave his evidence. We are not persuaded that such observation is accurate in view of the lapse of time between the giving of the evidence and the observation. In any event, DW2 did not give any evidence on the disappearance and the reappearance of the will. A

There was no explanation either by DW1 or DW2 as to who collected the will or how the will eventually reached the defendant or for that matter, the reason for DW1's firm refusing to give the will apparently upon the instruction received from the Bar Council. There was no explanation as to why DW1 requested that no police report be lodged. Despite all these, it is strange how the solicitors for the defendant could state in their letter that they had taken possession of the will from DW1, an assertion which was denied by DW1. With respect, it would appear that the learned judge had accepted the evidence in toto without proper scrutiny. We say this because the learned judge failed to address his mind to those facts or the totality of the evidence. B C

Whatever the bitterness DW2 might have against Mr Wong (DW1) is irrelevant and has no place in the suit between the plaintiff and the defendant. In any event, the evidence of DW2 is a mere repetition of the statement in the affidavit he had sworn earlier. Having admitted in the affidavit that he attested the will in question, it would not be possible for him to either deny or change his story. D

In dealing with the evidence of DW3, the learned judge treated the matter in a similar vein. In his judgment, the learned judge considered DW3's evidence and held that DW3: E

> ... gave evidence in a calm manner. When [seen] in the box, there was nothing at any time to suggest he was hiding something such as part of a conspiracy to defraud the said nephew. He was an Indian community leader in Sitiawan with four titles conferred on him .... His evidence was impressive, convincing as [sic] the other two subscribing witnesses. F

These observations too was made some five years after the evidence was given.

The learned judge omitted to take into consideration a very material fact. The evidence shows that DW3 had given an affidavit to DW1 confirming that it was he who introduced the deceased to DW1. The reason for securing such an affidavit had not been disclosed. The learned judge failed to appreciate that having given such an affidavit it would be unlikely for DW3 to change his story. G

DW3's evidence is totally dependant on the fact that he had a chance meeting with the deceased on the evening of 6 April 1982 when the deceased had asked to be introduced to a lawyer. The evidence however is not supported by contemporaneous and independent evidence before the court. The evidence before the court was that the deceased had a meeting with PW9 at 3pm on 7 April 1982. The deceased then registered into a hotel at 5.30pm. This important fact is confirmed by the entry in the hotel register which showed that the deceased had checked in at 5.30pm on 7 April 1982. The important question here is whether DW3 did meet the deceased on 6 April 1982 in the light of the contemporaneous evidence to H I

A the contrary. Unfortunately, the learned judge failed to direct his mind to this issue which to our mind is a serious omission on the part of the learned judge.

The evidence of DW1, DW2 and DW3 must be tested against the totality of the evidence and probabilities of the case. There is a discrepancy between the evidence of DW2 and the evidence of both DW1 and DW3.
B DW2 could not remember seeing DW3 in the office on that day. The doubt could easily have been resolved by calling DW3's clerk, Kalyanasundaram, who is an independent witness, to give evidence. No consideration was given to this material fact.

At the close of the evidence of DW1, DW2 and DW3 and even at the
C close of the defendant's case numerous circumstances that clearly excited the suspicion of the court were still present and not removed. The learned judge failed to consider any one of them and to ascertain if the burden under the law which requires the defendant to prove his case had been discharged. Suspicious circumstances surrounding the emergence of the will are too numerous to be set out in detail. Suffice it to say that the
D circumstances are highly suspicious, abnormal or not normally expected in any ordinary situation or from a normal person. None of these suspicious circumstances was explained. The suspicion was not removed at all either after the witnesses gave their evidence or for that matter, even after the close of the defendant's case.

E The next question that arises here is whether an appellate court can interfere with the finding of facts by the court below. The approach taken by the appellate court on matters where the learned judge has made certain findings of facts based on the evidence before him is well settled. Gunn Chit Tuan J (as he then was) in *TN Nathan v PP* [1978] 1 MLJ 134 at p 136 held that:

F

> It is true the learned President had a great advantage of seeing and hearing the witnesses whereas an appellate court has to rely on the recorded evidence. But again, to quote the words of Raja Azlan Shah FJ in the case of *Tengku Mahmud v PP* [1974] 1 MLJ 110, 'a judge of fact should always test the complainant's evidence against the totality of his evidence and the probabilities
G of the case'.

In the case of *Muniandy & Ors v PP* [1966] 1 MLJ 257, Ong Hock Thye FJ (as he then was) cited with approval (at p 258) the decision in *Yuill v Yuill* [1945] P 15 at p 19 where Lord Greene MR had this to say:

> We were reminded of certain well-known observations in the House of
H Lords dealing with the position of an appellate court where the judgment of the trial has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasion, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my
I opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever lier, or

led to form an unfavourable opinion of an honest witness, and may express his view that his demenour was excellent or bad as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demenour must necessarily lose its value.

Ong Hock Thye FJ added at the same page:

In our view, being unshaken in cross-examination is not per se an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration. The fact that the trial judge believed implicitly in the truthfulness of Nagarachnam and Ramasamy does not preclude closer scrutiny of their evidence and this we have done.

Edgar Joseph Jr SCJ, in the case of *Yusoff bin Kassim v PP* [1992] 2 MLJ 183 at p 188, held that:

We recognized that the learned trial judge had a great advantage denied to this court, of seeing and hearing the witnesses and the appellant testify. Be that as it may, there is a wealth of authority for the proposition that upon an issue depending upon oral evidence where there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial judge, who has seen and heard the witnesses except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities (see for example, *Khoo Sit Hoh & Ors v Lim Thean Tong* [1912] AC 323). An appellate court can, therefore, in appropriate cases act upon its own view of the conflicting evidence (see *Coghlan v Cumberland* [1898] 1 Ch 704 and *Bigsby v Dickinson* (1876) 4 Ch D 24).

In all the circumstances, having regard to the fact that the trial judge had overlooked or failed to take into account or given proper weight to, or drawn proper inferences from, the matters to which we have adverted, which otherwise might have caused him to come to a different conclusion, we were satisfied that he had not taken proper advantage of his having seen and heard witnesses (per Lord Thankerton in *Watt or Thomas v Thomas* [1947] 1 All ER 582) and so the present appeal came within the range of those cases where we were at liberty to act upon our own view of the conflicting evidence.

Obviously, whilst a testator is alive no solicitor will communicate to the named executor or a beneficiary in the will. The reason for communicating to the defendant and informing him of the will and its existence was attributed to a letter (P15) that was allegedly returned undelivered with the annotation 'addressee was dead'. DW1 said so in exh P16. DW1 insisted that the seal was unbroken even though he could not recall whether it was a staff who informed him or if he had seen it personally, or for that matter, what language the annotation appeared in. Only after this information did DW1 communicate to the defendant. But DW1 was unable to produce that letter. The plaintiff effectively rebutted DW1's evidence by producing exh P15, the very letter which was supposed to have been returned undelivered. The learned judge failed to appreciate

this crucial evidence and see the inconsistency in the evidence, or take account all the probabilities. In any event, His Lordship failed to give proper weight and draw proper inference from this. As observed by Ong Hock Thye FJ (as he then was) in *Muniandy & Ors v PP*, the judge's appraisal of the witness must necessarily lose its value. Even though no evidence was given as to the whereabout of the original file, there was evidence that the file that he had in hand was only a duplicate file. It is not known what happened to the original file.

Certain facts were not clear, but no explanation was given. For example, there was no explanation as to why only two copies of the will were prepared and not three as was the normal practice in DW1's office. It was also not explained why both copies were given to a stranger. There was also no answer as to how both these copies turned up with the defendant. The duplicate copy was found in the file which DW1 had with him while giving evidence. He said that he received it from the solicitors for the defendant. The inconsistencies that were pointed out here are but a few but sufficient to hold that the favourable view formed by the learned judge must lose its value. In this context, DW2's and DW3's interest in the matter, which had been adverted to earlier, must be considered. Speaking of a witness' interest, we respectfully agree with the observation of Raja Azlan Shah J (as he then was) in the case of *Karthiyayani v Lee Liong Sin* [1975] 1 MLJ 119 at p 120D–F:

> If a witness is independent, ie, if he has no interest in the success or failure of a case and his evidence inspires confidence of the court, such evidence can be acted upon. A witness is normally to be considered independent unless he springs from sources which are likely to be tainted. If there are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the court will have to come to a decision having regard to such circumstances. The court must examine the evidence given by such witness very carefully and scrutinize all the infirmities in that evidence before deciding to act upon it.

In the case before us there is evidence, by DW2's testimony that DW1 had fraudulently procured an affidavit from him. Similarly DW3 had also given an affidavit. It is obvious that both of them knew or were aware that they could not change their stories or depart from the statement they had made earlier on oath, whatever be the reasons. They had an interest to give evidence consistent with their statement in the affidavits.

There were discrepancies in the evidence between DW1 and DW2 in regard to the manner of the execution of the will. It is clear that DW2's evidence contradicted the evidence of DW1. The learned judge however chose to rely on the evidence of DW1 on that issue.

With respect, we wish to recall the words of Spenser-Wilkinson J in *Goh Ah Yew v PP* [1949] MLJ 150 at p 153 wherein he held:

> A witness cannot be regarded as a split personality who is worthy of credit at one moment and unworthy of credit at the next.

This observation was cited with approval by Edgar Joseph Jr J (as he then was) in *Khoo Cheng Huat v PP* [1991] 1 MLJ 42 at p 45.

We now come to the exclusion of PW1's evidence by learned judge.

The plaintiff adduced expert evidence through PW1, one Dr Julius Grant who, according to the trial judge, gave his evidence in an 'impressive manner'. PW1 based his opinion on comparing 20 undisputed signatures of the deceased with the disputed signatures in the alleged will. Included in the specimen signatures were two contemporaneous signatures which were dated the same date as that of the will. It was PW1's evidence that there were three fundamental differences in the signatures, based on which he arrived at an opinion that the will was a forgery. He demonstrated these fundamental differences by using enlarged photographs of the signatures. Neither the peritus of PW1 nor the method used by him were questioned. In any event, having examined the evidence in the records, it can safely be said that his peritus was established conclusively. But the learned judge completely disregarded PW1's evidence and misdirected himself by holding that the court could only act on such opinion evidence if there was corroboration either by direct or circumstantial evidence. There is no such requirement in law.

The learned judge further concluded that PW1's evidence could have prevailed if the plaintiff (defendant) '... had not called these three eye witness. I would be failing in my duty if I should reject their evidence'. This, in our respectful view, is a misdirection in law.

Sections 45(1) and (2), 47, 51, 73(1), (2) and (3) of the Evidence Act 1950 are relevant in this context. The relevant sections are reproduced below.

45 Opinions of third persons when relevant

(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.

47 Opinion as to handwriting when relevant

When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to have been written or signed, that it was or was not written or signed by that person, is a relevant fact.

51 Grounds of opinion when relevant

Whenever the opinion of any living person is relevant, the grounds on which his opinion is based are also relevant.

73 Comparison of signature, writing or seal with others admitted or proved

(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

(2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by that person.

(3) This section applies also, with any necessary modifications, to finger impressions.

It is trite law that the principal object of expert evidence is to assist the court to form its own opinion. An expert should give his reasons. The court is the final arbiter, not the experts or eyewitness. Despite the wealth of authorities available on this subject, the errors that appear in judgments invite us to elaborate on this matter.

The Supreme Court of India's decision in *Murarilal v State of MP* AIR 1980 SC 531 at p 534 is illustrative and some paragraphs of the judgment are worth reproducing:

> 4 We will first consider the argument, a stale argument often heard, particularly in criminal courts, that the opinion evidence of a handwriting expert should not be acted upon without substantial corroboration. We shall presently point out how the argument cannot be justified on principle or precedent. We begin with the observation that the expert is no accomplice. There is no jurisdiction for condemning his opinion-evidence to the same class of evidence as that of an accomplice and insist upon corroboration. True, it has occasionally been said on very high authority that it would be hazardous to base a conviction solely on the opinion of a handwriting expert. But, the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses — the equality of credibility or incredibility being one which an expert shares with all other witnesses — but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger-print has attained near perfection and the risk of an incorrect opinion is practically non-existent. On the other hand, the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher. But that is a far cry from doubting the opinion of a handwriting expert as an invariable rule and insisting upon substantial corroboration in every case, howsoever the opinion may be backed by the soundest of reasons. It is hardly fair to an expert to view his opinion with an initial suspicion and to treat him as an inferior sort of witness. ... . His opinion has to be tested by the acceptability of the reasons given by him. An expert deposes and not decides. His duty 'is to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the judge to form his own independent judgment by the application of these criteria to the facts proved in evidence'.
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> 5 From the earliest times, courts have received the opinion of experts. As long ago as 1553 it was said in *Buckley v Rice Thomas* (1554) 1 Plowden 118: 'If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby

it appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation. A

6 Expert testimony is made relevant by s 45 of the Evidence Act and where the court has to form an opinion upon a point as to identity of handwriting, the opinion of a person 'specially skilled' in questions as to identity of handwriting' is expressly made a relevant fact. ... The Evidence Act itself (s 3) tells us that 'a fact is said to be proved when, after considering the matter before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists'. It is necessary to occasionally remind ourselves of this interpretation clause in Evidence Act lest we act on artificial standard of proof not warranted by the provisions of the Act. ... It is also to be noticed that s 46 of the Evidence Act makes facts, not otherwise relevant, relevant if they support or are inconsistent with the opinion of experts, when such opinions are relevant. So, corroboration may not invariably be insisted upon before acting on the opinion of a handwriting expert and there need be no initial suspicion. But, on the facts of a particular case, a court may require corroboration of a varying degree. There can be no hard and fast rule, but nothing will justify the rejection of the opinion of an expert supported by unchallenged reasons on the sole ground that it is not corroborated. The approach of a court while dealing with the opinion of a handwriting expert should be to proceed cautiously, probe the reasons for the opinion, consider all other relevant evidence and decide finally to accept or reject it. B C D E

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9 In *Fakhruddin v State of Madhya Pradesh* AIR 1967 SC 1326; 1967 Cri LJ 1197, Hidayathullah J said: 'Both under s 45 and s 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case, the court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become a handwriting expert but to verify the premises of the expert in the one case and to appraise the value of the opinion in the other case. This comparison depends on an analysis of the characteristics in the admitted or proved writings and the finding of the same characteristics in large measure in the disputed writing. In this way the opinion of the deponent whether expert or other is subjected to scrutiny and although relevant to start with becomes probative. Where an expert's opinion is given, the court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the court must play the role of an expert but to say that the court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witness. F G H

These observations lend no support to any requirement as to corroboration of expert testimony. On the other hand, the facts show that the court ultimately did act upon the uncorroborated testimony of the expert though the judges took the precaution of comparing the writing themselves. I

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A 11 We are firmly of the opinion that there is no rule of law, nor any rule of prudence which has crystallized into a rule of law, that opinion evidence of a handwriting expert must never be acted upon, unless substantially corroborated. But, having due regard to the imperfect nature of the science of identification of handwriting, the approach, as we indicated earlier, should be one of caution. Reasons for the opinion B must be carefully probed and examined. All other relevant evidence must be considered. In appropriate cases, corroboration may be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of a handwriting expert may be accepted. There cannot be any inflexible rule on a matter which, in the ultimate analysis, is no more than a C question of testimonial weight. ...

12 The argument that the court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert, is entirely without force. Section 73 of the Evidence Act expressly enables the court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports D to have been written. If it is hazardous to do so, as sometimes said, we are afraid it is one of the hazards to which judge and litigant must expose themselves whenever it becomes necessary. There may be cases where both sides call experts and the voices of science are heard. There may be cases where neither side calls an expert, being ill able to afford him. In all such cases, it becomes the plain duty of the court to E compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the court is no expert. Where there are expert opinions, they will aid the court. Where there is none, the court will have to seek guidance from some authoritative textbook and the court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other F evidence ... .

Adams J in *Sim Ah Oh v PP* [1962] MLJ 42 at p 43 held:

> The evidence of the expert must be tested like any other evidence against the facts upon which he is deposing. The expert should have been asked by the prosecutor to elaborate and give his reasons as to why he said these odd G pieces of paper were in fact documents relating to public lottery, and the learned President should have considered these reasons before he came to his finding. The appeal must be allowed on that ground.

In the case of *Lai Yong Koon v PP* [1962] MLJ 327 at p 328, Ismail Khan J (as he then was) observed:

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> The fact that the expert is not obliged to give any evidence as to the modus operandi of the lottery in this case does not relieve him, however, of the necessity of giving detailed evidence of his reasons for holding that P3, P4 and P5 are Chee Fah stakes. On the subject of the duty of an expert, the law which has been applied in a number of subsequent decisions is clearly stated in the case of *Sim Ah Song & Anor v R* [1951] MLJ 150 where Brown Ag CJ I said at p 151:
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> > 'The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his

> explanation. But a bare expression of his opinion has no evidential value at all. Unless he gives an explanation which supplies the understanding of the subject which the court lacks, the court is in no better position than it was before to determine the question which it is its duty to determine, and if the court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the court'.

In this case the learned magistrate merely echoed the opinion of PW5 and did not appear to have appreciated that it was his duty to study the exhibits himself with the assistance of a sufficiently detailed explanation from the expert and also with his knowledge gained in previous cases, if any, before he could satisfy himself that the exhibits related to betting and staking in the Chee Fah lottery.

In the case of *Dalip Kaur v Pegawai Polis Daerah* [1992] 1 MLJ 1 at p 8, the Supreme Court held:

> Mr Karpal Singh also complained that the learned judicial commissioner should not have relied on the evidence of the document examiner to come to a conclusion that the deed poll was a forgery. The document examiner who gave evidence stated that after examining ten specimen signatures and the signature of the deed poll and the signature on the form (the borang ikrar under the Enactment), he found that the signature on the deed poll did not originate from the writer of the signatures on the other documents. It is trite law that evidence by a handwriting expert should be viewed with caution as it is only an opinion evidence. But such evidence is entitled to be given proper consideration and weight in the context of the other evidence available to the court.

In the case of *Dato' Mokhtar bin Hashim v PP* [1983] 2 MLJ 232 at p 255, Hashim Yeop Sani J (as he then was) held:

> The opinion of witnesses possessing peculiar skills is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment without the assistance of an expert. Thus the opinion of these skilled witnesses is admissible in evidence including where the opinions rest on the personal observations of the witnesses themselves and on the facts within their knowledge. To qualify to give such evidence the witness must satisfy the court that he is indeed an expert, that he is specially skilled in the field of the enquiry carried out by him. An expert is one who is skilled in any particular art, trade or profession being possessed of particular knowledge concerning the same. The witness must have made a special study of the subject or have acquired special experience on the subject. A similar question arose in the case of *R v Silver Lock* [1894] 2 QB 766 at p 771, where handwriting was in issue, and of the person to give expert evidence Lord Russell of Kilowen CJ said 'Is he peritus? Is he skilled? Has he an adequate knowledge?' The same test was applied by Suffian LP in *PP v Muhamed bin Sulaiman* [1982] 2 MLJ 320 where the Lord President said:
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> > 'The only question was, is Mr Lum peritus, is he skilled, is he skilled in determining whether a particular bullet has gone through the barrel of a particular rifle. He need not become so skilled in any particular way nor by special study nor professionally. It is enough if he has had sufficient experience, sufficient practical experience, to acquire the necessary skill, so that he has adequate knowledge.'

A If a witness is not skilled the judge will direct that his evidence be disregarded. But once it is determined that his evidence is admissible the rest is merely a question of value or weight which will be that which the court will attach to it as the court believes the witness to be peritus.

The learned judge should have considered the reasoning given by the B expert and with that assistance arrived at the conclusion. In failing to do so the learned judge had abdicated his function. The learned judge is entitled to reject the evidence but not before considering such evidence. The evidence of the expert is admissible and relevant to the fact in issue properly placed before the learned judge. The learned judge ought to consider all such evidence that is before him prior to arriving at a finding C on the issue. Only after such due consideration been given could he come to a finding. In the case before us, the learned judge did not consider the evidence of PW1 at all. The learned judge did not determine the issue of the forgery. However, since the evidence is before us, we have taken the opportunity of comparing the signatures with the assistance of the D explanation given by PW1 in his evidence. We are satisfied that there are fundamental differences between the disputed and admitted signatures. These differences are of vital importance.

With respect the learned trial judge ought to have accepted the expert evidence of Dr Julius Grant (PW1) that the signature in the will is not the signature of the deceased. His Lordship ought to have so concluded, E having regard to the evidence in its totality including the very unlikelihood of an extremely careful and cautions non-practising lawyer like the deceased to have simply walked into a law firm in Jalan Masjid India, Kuala Lumpur to have his last will drawn up by a solicitor with whom he had no previous dealing, and yet leaving the will at the solicitor's office without making any F payment or ever collecting it or leaving any instruction to the solicitor. In our view, the suspicious circumstances in which the will had suddenly appeared together with the evidence of Dr Julius Grant has proved beyond reasonable doubt that the will is a forgery. What it more pertinent is the fact that there was no love lost between the defendant (the purported beneficiary) and his brother (the deceased) for the will to be prepared in G such unholy haste, by a solicitor whose reputation does not inspire confidence by his very conduct in absconding from court as a material witness before the completion of his cross-examination.

For the reasons stated above, we would allow this appeal with costs here and in the court below. We also ordered that the deposit be refunded H to the appellant.

Appeal allowed.

Reported by Kenneth Goh

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